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19 51 **File No.** O. Pri. Edu. Bom. /51 pt. II

Legal Deptt.

A **BRANCH**

Subject:— Opinions under the Bombay Primary Education Act 1947

P 70 E

O. Pri. Edu. Bom. /51 pt. II

File No.

Gen. 194 c.

138-A

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HMP.
14/6/56.

Office of the R.L.A.

Mere disobedience of an order under section 144 Criminal Procedure Code is not punishable. The disobedience is punishable if it is attended with the consequences or tendency to such consequences as has been provided by paragraphs 2 and 3 of section 188 Indian Penal Code. Under paragraph 2, which is relevant in the present case, it must be proved that "such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any person lawfully employed." The intention of the person who disobeys is not relevant. It is sufficient if the offender knows of the order which he disobeys and that his disobedience produces or is likely to produce harm. Likelihood or tendency is thus sufficient. Whether there is evidence to establish such likelihood or tendency will depend upon the facts of sach case.

Sd. P.M.Lad
3/3
Remembrancer of Legal Affairs.

U.R.to H.D.,No.269/A-Confl.,dated the 4th March 1953.

MRP.
15/6/56.

Immediate. No.1327-A.

Office of the
Remembrancer of Legal Affairs,
Bombay Castle(Bombay No.1), 20th January 1953.

To

The Secretary to the Government of Bombay,
Public Works Department,
Bombay.

Subject:- Complaint against Messrs. Atlas Engineering Co., Bombay, 2/6 Advani Chambers, Sir P. Mehta Road, Bombay for the non-supply of electric service meters ordered against I.S.D. rate contract.

Sir,

With reference to the letter No.Elg. Con 15/ /1942, dated the 16th January 1953, from the Chief Engineer, Electric Grid Offices, addressed to you, and a copy of which was endorsed to me for my advice in the matter, I have the honour to observe as follows:-

In the first case the action of the Company in selling 150 meters clearly amounts to criminal breach of trust under section 409 of the Indian Penal Code. The offence under section 409 is not compoundable. If, however, Government intends to take delivery of the remaining 150 meters, now offered by the Company, and not to proceed with the case any further it would be possible to withdraw the prosecution, with the consent of the Court, under section 494 of the Code of Criminal Procedure, 1898. The subsequent offer of the Company to give delivery of the meters, even if accepted, would not be a bar in respect of the

prosecution.-

prosecution (Mayandi Pillai (1886)1 Weir 462). The acceptance should not be in such terms as to amount to an admission that the meters now being offered were the same as had been kept with the Company in trust. The prosecution also would not bar a civil remedy against the company for the recovery of the meters in question or due compensation thereafter.

3. As regards the second order, though 90 per cent. price has already been paid to the Company and the meters were also inspected by Government's agent it does not appear that the ownership of the meters was transferred to Government. Consequently no action for "breach of trust" can be taken at present. If after giving sufficient time to the Company, it does not supply the remaining meters, it would be possible for Government to recover the amount already paid to it therefor and also adequate compensation for breach of contract. Since however, the matter is under investigation any action taken at present would be premature.

Yours faithfully,

Sd, P.M.Lad
20/1
Remembrancer of Legal Affairs.

MRP.
15/6/56.

Office of the R.L.A.

Attention of the Public Works Department may be drawn to the last line of para.3 of the R.L.A's letter dated 20th January 1953, wherein it is stated that since the matter is now under investigation any action taken at present would be premature. It means that the investigation should be allowed to take its normal course and that if any action is taken independently of the investigation and pending its conclusion such action would be premature.

Sd. P.M.Lad
2/3
Remembrancer of Legal Affairs.

U.R.to P.W.D.,No.4122/A, dated the 2nd March 1953.

MRP.
15/6/56-

Office of the R.L.A.

Judicial powers are exercised by a nyaya panchayat constituted under the Bombay Village Panchayats Act, 1933, by virtue of the special provisions made in the said Act in that behalf. They are not conferred under the Criminal Procedure Code. The Nyaya Panchayat would not therefore come within the purview of section 38A of the Code of Criminal Procedure. The R.L.A's opinion No.10604, dated the 4th July 1951 would not be applicable in this case.

2. Under section 35(1) of the Bombay Primary Education Act, 1947, as substituted by section 6 of Bom.XXV of 1952, the penalty for forfeiture failure to cause child to attend approved schools can be inflicted only by a judicial magistrate; and as such that section would not now require any further amendment after the separation comes into effect.

Sd. P.M.Lad
14/4
Remembrancer of Legal Affairs.

U.R.to H.D.,No.8099/A, dated the 15th April 1953.

MRP. -
15/6/56.

Office of the R.L.A.

Code of Criminal Procedure, 1898, Section 10(2).

Appointment of more than one additional D.M. -- whether feasible.

The question for consideration is whether under section 10(2) of the Criminal Procedure Code, 1898, as amended by the Bombay Separation of Judicial and Executive Functions Act, 1951, more that one Additional District Magistrate can be appointed for the same District.

2. Section 10(2) provides for appointment of an additional District Magistrate. Under section 13(4) of the Bombay General Clauses Act, 1904, words in the singular shall include the plural "unless there is anything repugnant in the subject or context."

3. The subject and context in the present case indicate that a singular was advisedly used. A Sessions Division is generally a district though sometimes it may consist of more than one district (section 7(1)). The head of the Sessions Division is the Sessions Judge and of the District the District Magistrate and there can in the nature of things be only one Sessions Judge for the Sessions Division and one District Magistrate for the district. This shows that when section 9(1) provides for appointment of a judge of the Court of Session and section 10(1) for appointment of a District Magistrate in every district the singular is not meant to include the plural. The appointment of an Additional Sessions Judge is made under section 9(3)

and

and of an Additional District Magistrate under section 10(2). Section 9(3) provides for appointment of Additional Sessions Judges in the Court of Session whereas section 10(2) provides for appintment of an additional District Magistrate. The difference in phraseology suggests that in the matter of appointments of these officers, where the plural was intended a plural has been used and where the singular was intended a singular has been used. This is further indicated by the phraseology of section 12(1) and section 18(1) where a plurality of appointments is definitely provided for. Therefore, the words "an additional District Magistrate" in section 10(2) must be construed as not to include a plural.

Sd. P.M.Lad
13/3
Remembrancer of Legal Affairs.

U.R.to H.D.,No.5036/A, dated the 14th March 1953.

MRP.
15/6/56.

Office of the R.L.A.

The D.O.letter dated 25-6-1952 written by Shri Kasbekar to the D.S.P., Poona alleges that Shri Agashe was concerned in the commission of the following acts:-

(1) touting,

(2) cheating,

(3) illegal detention of person.

These would be offences under sections 163, 420 and 339 Indian Penal Code. The letter wants action to be taken and would, therefore, amount to First Information and the D.S.P. would be entitled to treat it as such.

Sd. P.M.Lad
7/4
Remembrancer of Legal Affairs.

U.R.to H.D.,No.6673/A, dated the 9th April 1953.

MRP.
15/6/56.

No.6643/A.
Office of the
Remembrancer of Legal Affairs,
Bombay Castle,(Bombay No.1),8th April 1953.

From

Shri P.M.Lad, I.C.S.
Remembrancer of Legal Affairs,
Bombay.

To

Shri N.H.Phadnis, B.A., LL.B.
Public Prosecutor,
Satara South, Sangli.

Subject:- Cognizance of the offence under section 161 of the Indian Penal Code.

Sir,

With reference to your letter No.177, dated the 12th March 1953, I have the honour to inform you that with the deletion of the proviso to section 3 of the Prevention of Corruption Act, 1947, by section 2 of Act No.LIX of 1952, there is now no repugnancy left between the amendment effected by the Government of India Act of 1947 and the one effected by the Bom.XXX of 1946.

2. From the amendment carried out in columnk 3 of Schedule II in Criminal Procedure Code relating to section 166 by section 3(b) of Bom.XXX of 1946 it would appear that the retention of the word "ditto" in column 3 in respect of sections 162 to 166 is intentional and these sections should also therefore be deemed to have been amended accordingly.

Yours faithfully,

Sd. Akbar S. Sarela
for Remembrancer of Legal Affairs.

MRP.
15/6/56.

Office of the R.L.A.

Separation of Judiciary from Executive - reappointment of existing judicial magistrates.

The appointments of the Magistrates of the 1st, 2nd and 3rd Class made by the State Government under section 12(1) of the Criminal Procedure Code before it was amended by Bombay Act No.XXIII of 1951 continued to be valid under the amended Code by reason of section 3 of the Bombay Act No.XXIII of 1951 and therefore it would not strictly be necessary to reappoint them as Judicial Magistrate. But as under the Code before it was amended they exercised powers some of which will cease to be exercised by them by reason of the fact that they will no more be Executive Magistrates under the amended Code, it is desirable to make the position as regards their powers clear by reappointing them as Magistrates of the 1st, 2nd and 3rd Class as the case may be under the amended Code.

2. Similarly, the District Magistrate and the Sub-Divisional Magistrates, under sections 10 and 13 of the Code before it was amended by Bombay Act No.XXIII of 1951, exercised powers of the 1st Class Magistrate or of the 2nd Class Magistrate as the case may be. But all those powers cannot be exercised by them as Executive Magistrates under the amended Code. It is now necessary, therefore, to withdraw those powers with a view to bring their position in line with the position which they occupy as Executive Magistrates

under

under the amended Code.

3. Therefore, to remove all doubts it is desirable to issue a comprehensive notification notifying specified persons as Judicial Magistrates of one or the other class as envisaged in section 6-A I of the Code and Executive Magistrates of one or the other class as envisaged in Section 6-A II and at end of the notification it may be stated that all other powers conferred on the respective Magistrates except those mentioned in the notification are withdrawn.

Sd. P.M.Lad
15/4
Remembrancer of Legal Affairs.

U.R.to H.D.,No.9091/A, dated the 16th April 1953.

MRP.
15/6/56.

Office of the R.L.A.

Code of Criminal Procedure, 1898. Section 7(1) -- inclusion of two talukas from one district to another for criminal administration.

The word "district" has not been defined in the Criminal Procedure Code, 1898, or in the General Clauses Act and a full bench of the Madras High Court has held in re-Arumugha Solagan (32 Cr.L.J. 1095) that the word "district" in section 7(1) of the Code of Criminal Procedure, 1898, does not necessarily refer to a revenue district but means a district for the purposes of criminal administration. It is, however, necessary under that section that a sessions Division should be equivalent to a whole of such district or should be equivalent to a number of such whole districts without having a fraction. In view of this there would be no objection to include the Amalner and Parola talukas of the East Khandesh District into the sessions division of West Khandesh for the purposes of Criminal administration as suggested by the High Court; provided they are also included under the jurisdiction of the District Magistrate of West Khandesh for the purposes of executive magisterial work.

Sd. J.R.Dhurandhar
25/4
Remembrancer of Legal Affairs.

U.R. to H.D., No.9781/A, dated the 25th April 1953.

MRP.
15/6/56.

Office of the R.L.A.

The course suggested by the District Magistrate, Satara South, at 'B' on p.9 C/S would involve an amendment of G.N. H.D. No.27/C, dated the 25th April 1950, with retrospective effect, which would not be legally feasible. The only other alternative would be to enact a validating legislation. But, since no body has complained so far in this behalf this course also does not appear to be necessary at this stage.

Sd. J.R.Dhurandhar
23/4
Remembrancer of Legal Affairs.

U.R.to H.D.,No.9663/A, dated the 24th April 1953.

MRP.
15/6/56.

Office of the P.L.A.

The District Magistrate, Nasik in his letter refers to sections 503 and 506 of the Indian Penal Code. This appears clearly to be a mistake. What he has in mind is the Criminal Procedure Code. Sections 503 and 506 of the Criminal Procedure Code have recently undergone considerable amendments. All the sections 503 to 508A in Chapter XI. of the Criminal Procedure Code have been replaced by new sections 503 to 508A by section 21 of the Amending Act I of 1951.

The Commission in this cases is apparently issued under section 503(2). When the witness to whom the commission is issued is in a country or place outside India, a commission can issue if "arrangements have been made by the Central Government with the Government of such country or place for taking the evidence of witnesses in relation to criminal matters". (Vide section 504(3)). If such an arrangement has been made, then the commission is to be issued "in such form directed to such Court or officer and sent to such authority for transmission as the Central Government may by notification in the Official Gazette prescribe in this behalf".(ibid) Therefore, before this commission is issued, it must also be ascertained whether the form, etc. have been prescribed in this behalf by the

Central -

by the Central Government.

It may further be pointed out that under section 506 "the parties to any proceeding under this Code in which a commission is issued may respectively forward any ~~interrogation~~ interrogatories in writing which the Court or Magistrate directing the commission may think relevant to/issue." Therefore, the parties have a right to submit interrogatories. In this case interrogatories have been submitted only by the prosecution. It does not appear that the accused was even informed of the fact that the complainant was being examined on commission or was made aware of the interrogatories submitted by the prosecution and asked whether he wanted to submit any interrogatories for the cross-examination of witness. It is necessary to call upon him to do so.

Sd. P.M.Lad
4/4
Remembrancer of Legal Affairs.

U.R.to H.D.,No.6382/A, dated the 6th April 1953.

MRP.
15/6/56.

Office of the R.L.A.

Withdrawal of prosecution at appeal stage.

The view taken by the Secretary, Home Department, that there can be no withdrawal of a prosecution by Government at the appeal stage is correct. (Cf. Ananta Lal Sinha V. Jahiruddin Biswas, 28 cr. L.J. 833).

Sd. J.R.Dhurandhar
30/4
Remembrancer of Legal Affairs.

U.R.to H.D.,No.10179/A, dated the 30th April 1953.

MRP.
15/6/56.

Office of the R.L.A.

The report under section 173 Criminal Procedure Code is to be fowarded to a Magistrate empowered to take cognizance of the offence on a police report. The power to take cognizance is governed by section 190. Under that section as it stood before its amendment by Bombay Act 23 of 1951 if cognizance is to be taken by a Magistrate other than a Presidency Magistrate, District Magistrate or Sub-Divisonal Magistrate he shall be specially empowered in that behalf. Therefore any other Magistrate who is specially empowered under section 190(1) can take cognizance on a police report made under section 173.

Sd. J.R.Dhurandhar
5/5
Remembrancer of Legal Affairs.

U.R.to H.D.,No.10344/A, dated the 6th May 1953.

MRP. -
15/6/56.

Legal Department.

R.I.No.10429, dated 29-4-53.

Submitted.

The question for the consideration of the R.L.A. is whether section 11(1) of the Official Secrets Act, 1923, requires any amendment in view of the separation of the Judiciary from the Executive. The Home Department has pointed out that under section 98 of the Code of Criminal Procedure, as amended by the Separation Act, both Judicial and Executive Magistrates can issue search warrants. No amendment to section 11(1) seems, therefore, necessary to H.D. The R.L.A. is requested to advise.

2. The view taken by the Home Department that no amendment to section 11(1) of the Official Secrets Act, 1923, seems necessary, is correct.

Id.M.V.T.
30/4/53

D.S.(Cr.)

Sd, Akbar S. Sarela
30-4-53

R.L.A.

Id. J.R.D.
1/& 5

U.o.r.to H.D.,No.10322/A, dated 2-5-1953.

MRP.-
15/6/56.

Office of the R.L.A.

The report in the 'Jan Sevak' appeared on 2nd March 1953. Before this report appeared the accused had been placed before the Magistrate on 23rd February 1953 for a confession and at that time they had stated before the Magistrate that they had been beaten by the police and were willing to go to the hospital for treatment. Subsequently in their statements before the Sub-divisional Police Officer, Rajpipla, the accused Jevla and Amarsing and the Vartania Sitala alleged that beating had taken place.

The only grounds on which these allegations of beating are stated to be false are that no such allegations were made by the accused to the Civil Judge and the First Class Magistrate, Rajpipla when they were produced before him for remand on 21st February 1953 and that no marks of injury were found on the accused Narsing and Amarsing when they were examined by the Medical Officer on 23rd February 1953. It is not clear from the papers whether the accused Jevla was examined by the Medical Officer and whether any marks of injury were found on him.

The allegations of beating are no doubt defamatory but if the Editor is able to show

that

that they were published in good faith he would be protected. In support of the contention of good faith he would rely on the facts stated in the first para. The prosecution in order to succeed must therefore show not merely that there is no satisfactory evidence in support of the allegations of beating but that the allegations of beating were altogether false and could not have been believed.

Sd. J.R.Dhurandhar
5/5
Remembrancer of Legal Affairs.

U.R.to H.D.,No.10481/A, dated the 5th May 1953.

MRP.
15/6/56.

Withdrawal of prosecutions.

GOVERNMENT OF BOMBAY.
Legal Department.
CIRCULAR No.9882/A.
Bombay Castle, 27th April 1953.

Attention of all the Secretariat Departments is invited to Instruction No.40(1)(c) of the Instructions regarding the business of Government issued under Rule 14 of the Rules of Business made under Article 166 of the Constitution of India and they are requested to see that all cases of withdrawal of prosecution envisaged by that Instruction are referred to the Legal Department as required therein. Government is further pleased to direct that in all such cases where the R.L.A. recommends withdrawal of the prosecution, the papers should be submitted to the Chief Minister (Home) through the Secretary, Home Department, before the orders are issued.

2. In the mofussil power to sanction withdrawal is left with the District Magistrate. If the District Magistrate makes a reference to Government the procedure indicated in the above paragraph should be followed.

3. These orders are in modification of the instructions issued in Political and Services Department Circular No.1581/34, dated the 2nd August 1952.

By order and in the name of the Governor of Bombay,

Sd. J.R.Dhurandhar
Secretary to Government.

To
All Departments of the Secretariat (except the Separate Department),

Copy forwarded with compliments for information to the Secretary to the Chief Minister.

MRP.
15/6/56.

Office of the R.L.A.

Code of Criminal Procedure, 1898 - appointment of Commissioner of Police as Presidency Magistrate.

Presidency Magistrates are primarily judicial Magistrates (section 6A-I(1)). They can become executive Magistrates to the extent that they are so specifically empowered by the State Government (section 6A-II(4)). A Commissioner of Police is not a Judicial Magistrate and the High Court with whose approval a judicial Magistrate will ordinarily be appointed is not likely to accept the proposal to appoint a Commissioner of Police a Presidency Magistrate. That being so it is not possible for a Commissioner of Police to be a Presidency Magistrate specially empowered. He can, however, be appointed a Special Executive Magistrate under section 14(2). His powers as a Special Executive Magistrate, however, will be limited by the proviso to section 14(2). Under that proviso no power shall be conferred on a police officer except so far as may be necessary for preserving the peace, preventing crime and detecting, apprehending and detaining offenders in order to their being brought before a Magistrate and for the performance by the officer of any other duties imposed upon him by any law for the time being in force. Several sections of the Criminal Procedure Code must be examined to consider how far the powers to be exercised by the Executive Magistrates go beyond this proviso; because, if a police officer is appointed an Executive Magistrate he cannot exercise any powers except in accordance with this proviso. For example, a direction under section 144 of the Criminal Procedure Code can be

issued --

issued if the Magistrate issuing the direction considers that such direction is likely to prevent or tends to prevent obstruction, annoyance or injury or risk of obstruction, annoyance or injury to any person lawfully employed or danger to human life, health or safety, or a disturbance of the public tranquility or a riot or an affray. A police officer who is appointed a Special Executive Magistrate under section 14(2) being limited in the exercise of his powers by the proviso to that section can be empowered to issue a direction under section 144 only in respect of matters covered by the proviso to section 14(2) and not in respect of all the matters covered by section 144(1). No doubt, a police officer of the rank of a Commissioner of Police or a District Superintendent of Police has by virtue of his office powers to issue orders under section 39(1) of the Bombay Police Act, 1951, to prevent or suppress any riot or any disturbance of peace, but those powers also do not cover all the contingencies contemplated by section 144(1) of the Criminal Procedure Code. If, therefore, a Commissioner of Police is to be empowered to exercise all the powers of an Executive Magistrate, necessary amendments will have to be made in the relevant sections of the Criminal Procedure Code.
It appears that the High Court is anxious to relive the Chief Presidency Magistrate of the duties of an Executive Magistrate. In that case some other effective agency will hate to be substituted. The Home Department may examine all the relevant sections and consider what amendments are necessary to achieve the purpose, depending upon the agency to be employed for the purpose.

Sd. P.M.Lad
18/3
Remembrancer of Legal Affairs.

U.R.to H.D.,No.5376/A, dated the 19th March 1956.

MRP. 15/6/56.

Office of the R.L.A.

The investigating Officer recommends prosecution of Shri V. M. Kori and R.R.Patil only. He appears to concede that Shri Shirodkar , Khadabadi and Ajrekar cannot be successfully prosecuted.

As regards Shri V.M.Kori and R.R.Patil, the evidence is wholly circumstantial. In the case of circumstantial evidence, a prosecution can succeed only if it is incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of the guilt of the accused. In the present case the circumstantial evidence is not of that nature. The evidence is such that either of two conclusions is possible. On of dishonesty and the other of gross neglect. That being so the Court would lean in favour of the conclusion more favourable to the accused namely that at best they were grossly negligent. On that finding no offence of criminal breach of trust can be brought home.

The evidence in this case therefore will not sustain a successful prosecution. The case is more fit for a departmental inquiry.

Sd. J.R.Dhurandhar
12/5
Remembrancer of Legal Affairs.

U.R.to R.D.,No.10969/A, dated the 12th May 1953.

MRP.
15/6/56.

Office of the R.L.A.

The withdrawal of the prosecution in this case having been sanctioned by the District Magistrate without reference to the Government, the case does not fall within ~~the~~ paragraph 1 of the Legal Department Circular No.9882/A, dated the 27th April 1953, which was issued in modification of the instructions issued by the Political and Services Department Circular No.1581/34, dated the 2nd August 1952. In the mofussil power to sanction withdrawal is left to the District Magistrate as pointed out in the above L.D.Circular. The view taken in the Home Department note dated 7-4-1953 at page 81 ante is correct.

Sd. J.R.Dhurandhar
13/5
Remembrancer of Legal Affairs.

U.R.to H.D.,No.520/A-Confl., dated the 14th May 1953.

MRP.
15/6/56.

Office of the R.L.A.

Code of Criminal Procedure, 1898 - Section 12 -- jurisdiction of Magistrates --

On a plain reading of the first part of sub-section (1) of section 12 of the Criminal Procedure Code and sub-section (2) of that section, the jurisdiction of a Magistrate appointed under that section will extend throughout the District in which he is appointed. Thexx mere fact that areas are defined under second part of sub-section (1) will not exclude his jurisdiction from over the rest of the District. Such exclusion must be express or by necessary implication (Gulabrao vs. Emp. A.I.R. 1935 Bom.409). That being so, the exclusion of jurisdiction from over particular areas of a district will in every case attach to the Magistrate concerned and cannot attach automatically to his successor. His successor would ordinarily have jurisdiction over the whole district unless his jurisdiction also is by express or necessary implication limited to a particular area.

Sd. J.R.Dhurandhar
22/4
Remembrancer of Legal Affairs.

U.R.to H.D.,No.9520/A, dated the 22nd April 1953.

MRP.
15/6/56.

Office of the R.L.A.

Extention of an order under section 144, Cr. P.C.

The Additional District Magistrate, Satara, has issued an order under section 144 of the Criminal Procedure Code prohibiting holding of meetings etc. on the ground that on account of the tension in the minds of the workers controlled by the Cooper Engineering Ltd. Mazdur Sangh such meetings etc. are "likely to cause obstruction and annoyance to the persons lawfully employed and to disturb the public tranquility". The Additional District Magistrate's order is in force in the area since 22nd March 1953; but the situation has not improved. On the contrary it is apprehended that on account of communist agitation there is danger to human life and safety. The question for consideration is whether the order of the Additional District Magistrate can be extended by Government under sub-section (6) of section 144, Criminal Procedure Code, even if the original order does not specify the danger to human life and safety as one of the grounds for the making of the order. Secretary, H.D. is doubtful whether the order can be extended as proposed by the R.L.A. is requested to advise.

Sub-section (6) of section 144, Criminal Procedure Code provides that no order under this section shall remain in force for more than two months from the making thereof; unless, in cases of danger to human life, health or safety, or a likelihood of a riot or an affray, the State Government by notification in the Official Gazette otherwise directs. The powers conferred

by this sub-section, it appears, can be exercised by Government if the condition precedent for the exercise of those powers is satisfied; and it is not necessary that the District Magistrate's order should have been made ~~in~~ on one of the grounds mentioned therein. In Emperor v. Bhure Mal. 45 All. 526 it was held that "the Local Government was not concerned with the reasons given by the Magistrate, but with the actual order passed by him, and if the Local Government considered that there was danger to human life, health or safety or likelihood of a riot or affray in allowing processions to pass down those streets, the Local Government was perfectly competent under sub-section (5) to extend the period of the order". (Old sub-section (5) is present sub-section (6)). In these circumstances there would be no objection to extending the life of the order in the present case if Government is satisfied that there is danger to human life and safety.

Sd. J.R.Dhurandhar
15/5
Remembrancer of Legal Affairs.

U.R.to H.D.,No.643/A-Confl., dated the 16th May 1953.

MRP.
15/6/56.

Office of the R.L.A.

As the post of the Special Officer which Shri M.B.Jaisinghani now holds is different from that of a Mamlatdar and F.C. Magistrate in nature and duties, section 40 of the Criminal Procedure Code will not apply and Shri Jaisinghani will have to be invested afresh with F.C. powers if it is desired to confer those powers on him. The view taken by the Home Department is correct.

Sd. J.R.Dhurandhar
12/5
Remembrancer of Legal Affairs.

U.R.to H.D.,No.11050/A, dated the 13th May 1953.

MRP.
15/6/56.

Office of the R.L.A.

Separation of judiciary from Executive - Cognizance of offence under other laws.

Section 5(2) of the Criminal Procedure Code make, it clear that all offences under any law other than the Indian Penal Code are in the absence of an express provision in such laws to be dealt with and tried under the Code. There is nothing in the Industrial Statistics Act, 1942 or the Bombay Displaced Persons Premises Control and Regulation Act, 1952, to suggest that offences under the said Acts are to be dealt with and tried by Magistrates other than judicial Magistrates. Judicial and not Executive Magistrates would therefore be competent to take cognizance of offences under the said Act. It is not the intention of Government that after separation, offences under special laws should be tried by Magistrates other than judicial Magistrates. No amendment of the Act is necessary.

Sd. J.R.Dhurandhar
21/4
Remembrancer of Legal Affairs.

U.R.to H.D.,No.9390/A, dated the 21st April 1953.

MRP.
15/6/56.

Office of the R.L.A.

As the High Court is seized of the case under section 439, Criminal Procedure Code, it is not necessary to forward the application of Shri Sarafali Kadarbhai to the High Court. The Home Department's ~~xxx~~ view is correct.

Sd. J.R.Dhurandhar
18/5
Remembrancer of Legal Affairs.

U.R.to H.D.,No.11316/A, dated the 18th May 1953.

MRP.
15/6-56.

Office of the R.L.A.

Bombay Habitual Offenders Restriction Act, 1947.
Section 3(1) - Amendment of -

Section 3(1) of the Bombay Habitual Offenders Restriction Act, 1947, is relatable to section 110 of the Code of Criminal Procedure, 1898, under which only the executive magistrates would, after the separation of judiciary from the executive, be competent to take action. Consequently the action under the said section 3(1) will also have to be taken only by the executive magistrates. The position thus being clear, no amendment of section 3(1) appears to be necessary.

Sd. J.R.Dhurandhar
19/5
Remembrancer of Legal Affairs.

U.R.to H.D.,No.11447/A, dated the 20th May 1953.

MRP.
15/6/56

Office of the R.L.A.

Attention is invited to R.L.A's opinions No.8099A, dated the 15th April 1953 and No.9390A, dated the 21st April 1953. The reference to "Court" in sub-section (2) of section 35 of the Bombay Primary Education Act, 1947, is obviously to a judicial Court and no amendment of the sub-section would be necessary.

Sd. J.R.Dhurandhar
23/5
Remembrancer of Legal Affairs.

U.R.to E.D.,Through H.D.,No.11929/A, dated the 28th May 1953.

MRP.
15/6/56.

Office of the R.L.A.

Separation of judiciary from executive - effect of - on sec.7(2) of the Indian Fisheries Act, 1897.

The view taken by the Home Department that the order of detention under the proviso to sub-section (2) of section 7 of the Indian Fisheries Act, 1897, will, after the separation of judiciary from the executive, have to be passed by a judicial Magistrate, is correctm. No amendment of that section is, therefore, necessary.

Sd. J.R.Dhurandhar
22/5
Remembrancer of Legal Affairs.

U.R.to H.D.,No.11602/A, dated the 22nd May 1953.

MRP.
15/6/56.

Office of the R.L.A.

Separation of judiciary from Executive - effect on the Bombay Police Act, 1951.

Section 13.- After the separation comes into force no police officer can exercise the powers under the Code of Criminal Procedure, 1898, as a first class magistrate or as a Presidency Magistrate, as these officers are essentially judicial magistrates. No doubt the police officer can be appointed as special executive magistrates under section 14, but their powers under that section would be limited by the proviso to sub-section (2) of section 14. The powers given under section 13 of the Bombay Police Act, 1951, to the Inspector General and the Commissioner for Greater Bombay in respect of sections 94, 96, 97, 98, 105, 523,524 and 525 of the Criminal Procedure Code cannot be said to be the powers given for the purpose of preserving the peace, preventing crime and detecting, apprehending and detaining offenders in order to their being brought before a magistrate. As the Code stands at present, therefore, these powers cannot be given to any police officer after the separation comes into force. (cf. R.L.A's opinion No.5376/A, dated the 19th March 1953).

2. Section 21(1).- It will be necessary to delete the words "not lower in rank than that of second class" in this sub-section as proposed by the Home Department.

3. Section 39(3).- The powers of the District Magistrate under section 39(3) are of quasi-judicial nature and the District Magistrate can be said to be one of the tribunals on which the

powers

the powers are by the section conferred and as such the District Magistrates can continue to exercise them even after the separation.

4. Sections 69,74,75 and 77.- The view taken in the Home Department note that the magistrates referred to in these sections are judicial Magistrates is correct.

5. Section 70.- This section is a consequential one. The powers under sections 37, 38 and 39 referred to therein, are to be exercised by the Commissioner, District Superintendent of Police or District Magistrate. In view of this position the power under section 70 can also be exercised by an executive magistrate or a police officer and no amendment of that section would be necessary.

6. Sections 83, 84, 85, 86.- The powers of a Magistrate under these sections do not appear to be judicial and as such they can be exercised by the Commissioner of Police or by an executive Magistrate.

7. Section 95(2).- The powers of a Magistrate under this section will have to be exercised by a judicial Magistrate. Since the Commissioner of Police is not a judicial Magistrate he would not be able to exercise them in Greater Bombay, but the Presidency Magistrate having jurisdiction will have to exercise them.

8. Section 96(1).- The view taken in the Home Department note is correct.

Sd. J.R.Dhurandhar
12/5.

U.R.to H.D.,No.11041/A, dated the 13th May 1953.

MRP. -
16/6/56.

Office of the R.L.A.

Recovery of penalty under a bond by a prisoner released on parole.

The course suggested in the H.D. note is not feasible. As pointed out in Rameshwar Bhartia V. State of Assam, A.I.R. 1952 S.C. 405, action under section 514 can only be taken when the bond is taken by the Court under the provisions of the Code. The Criminal Procedure Code does not provide for taking of a bond by a court from prisoners released on parole and therefore, it would not be possible for the court to take the bonds as proposed without a suitable amendment of the law. However, if it is proposed to provide a suitable procedure for recovery of the penalty under the bond without amending the law, a condition may be inserted in the bond for recovery of the penalty as an arrear of land revenue (see R.L.A's opinion No.439-Confl. dated the 13th May 1952).

Sd. J.R.Dhurandhar
22/5
Remembrancer of Legal Affairs.

U.R.to H.D.,No.11673/A, dated the 23rd May 1953.

MRP.
16/6/56.

Office of the R.L.A.

Code of Criminal Procedure, 1898 -- Sec.523. Bombay Police Act, 1951 - sections 85 to 87.

The property in question might have been probably seized by the Police under the suspicion of its being stolen property or might have been found under circumstances which created suspicion of the commission of offence. But since the District Magistrate, Satara North, is not sure even as to whether it was connected with any criminal case it would be safer to take action under sections 85 to 87 of the Bombay Police Act, 1951, instread of under section 523 of the Code of Criminal Procedure, 1898.

Sd. J.R.Dhurandhar
29/5
Remembrancer of Legal Affairs.

U.R.to H.D.,No.11988/A, dated the 29th May 1953.

MRP.
16/6/56.

Office of the R.L.A.

Functions under section 23(1) of the Bombay District Vaccination Act should properly be with the Executive Magistrate. Under section 23(2), the Judicial Magistrate should act. It would therefore be necessary to suitably amend section 23 of the Act.

Sd. J.R.Dhurandhar,
5/6
Remembrancer of Legal Affairs.

U.R.to H.D.,No.12475, dated the 6th June 1956 .

MRP.
15/6/56.

Office of the R.L.A.

Code of Criminal Procedure - void summary trials - whether reference to High Court necessary -

The offence in these cases not being triable summarily the proceedings of the Magistrate who so tried it are void under section 530 of the Criminal Procedure Code (Emp. vs. Mahanand Kerajmal 41 Cr.L.J.190). But the High Court does not necessarily interfere in every case of such void proceedings (see Emp. vs. Yena, Crim. Law Journal 287 and State vs. Manga Vechan Crim. Ref. No.14 of 1953). In these cases nearly two years have passed since the trials took place and the sentences imposed are small fines. It is therefore unlikely that the High Court will at this late stage set aside the conviction and order new trials. No action need therefore be taken at this stage.

Sd. J.R.Dhurandhar - 2/6
Remembrancer of Legal Affairs.

U.R.to H.D.,No.12195/A, dated the 2nd June 1953.

MRP.
16/6/56.

Office of the R.L.A.

Separation of Judiciary from Executive - effect on section 11(1) of the Cotton Ginning and Pressing Factories Act, 1925.

In Greater Bombay, even after the separation of judiciary from the executive, the Chief Presidency Magistrate will continue to perform certain functions of an executive Magistrate. There would, therefore, be no legal objection to the Chief Presidency Magistrate continuing to exercise the power to sanction prosecution under section 11(1) of the Cotton Ginning and Pressing Factories Act, 1925, after separation.

Sd. J.R.Dhurandhar
26/5
Remembrancer of Legal Affairs.

U.R.to D.D.,No.11767/A, dated the 26th May 1953.

MRP.
16/6/56.

Office of the R.L.A.

The Child Marriage Restraint Act, 1929.- In section 8 of this Act the words "Magistrate of the first class" have already been substituted for the words "District Magistrate" by the Child Marriage Restraint (Second Amendment) Act, 1938. Therefore the amendment suggested by Home Department is not necessary.

2. (1) The Bombay Prevention of Prostitution Act, 1923, (2) the Bombay Prevention of Bigamous Marriages Act, 1946, and (3) the Bombay Prevention of Excommunication Act, 1949.- The view taken by Home Department in respect of these Acts is correct. No amendments to these Acts are necessary.

Sd. J.R.Dhurandhar
4/6
Remembrancer of Legal Affairs.

U.R.to H.D.,No.12404/B, dated the 5th June 1953.

MRP.
15/6/56.

Office of the R.L.A.

Code of Criminal Procedure, 1898 - Honorary Magistrates - appointment of -

The Honorary Magistrates in the Mofussil are appointed under section 12 of the Criminal Procedure Code and the Honorary Presidency Magistrates under section 18. Their appointment is made by the State Government and no consultation with the High Court for their appointment is necessary so long as it is not so provided by a public notification under article 237 of the Constitution. It is presumed that the Honorary Magistrates are not to exercise any judicial powers but are to perform functions of an executive nature. If so, no question of consultation with the High Court under section 38-A, Criminal Procedure Code, arises. That section is attracted only if judicial powers of the nature specified in the section are to be conferred.

Sd. J.R.Dhurandhar
3/6
Remembrancer of Legal Affairs.

U.R.to H.D.,No.12330/A, dated the 4th June 1953.

MRP.
16/6/56.

Office of the R.L.A.

Separation of judiciary from executive - effect of -

The word "after" occurring in column 4 of the entry relating to the Indian Forest Act, 1927, in Part II of the Schedule to the Bombay Separation of the Judicial and Executive Functions Act, 1951, is a misprint for the word "for". The necessary amendment in this behalf will be included in the next Repealing and Amending Bill.

2. The view taken by the Home Department that the reference to a Magistrate in section 44(3) of the Bombay Wild Animals and Wild Birds Protection Act, 1951, is to a judicial magistrate, is correct.

Sd. J.R.Dhurandhar
22/5
Remembrancer of Legal Affairs.

U.R.to H.D.,No.11675/A, dated the 23rd May 1953.

MRP.
16/6/56.

Legal Department.

Separation of Judiciary from Executive - notification issued under sec.36(3) of the District Emigrant Labour Act, 1932.

The view taken in the Political and Services Department note at p. 12 ante that the State Government is not now competent to issue a notification under section 36(3) of the District Emigrant Labour Act, 1932 and that the Central Government will have to be approached for the same, is correct. The withdrawal of powers of magistrates by this Government would,however, not affect the powers invested on such magistrates by the Central Government and which this Government is not competent to withdraw. G.N., P.& S.D., No.8993, dated 20-11-1934 was no doubt issued by this Government but after the Government of India (Adaptation of Indian Laws) Order, 1937, came into force, it will have to be deemed to have been issued by the Central Government which is the only competent authority to revoke the same (cf. paragraph 9 of the said Order). Strictly speaking, therefore it would not be legally necessary to issue afresh a notification under section 36(3) of the District Emigrant Labour Act, 1932. In view of the R.L.A's opinion No. 9091A, dated the 16th April 1953, it would, however, be desirable to approach the Government of India for issuing a fresh notification in this behalf in supersession of the existing one.

Sd. M.R.Meher
Additional Secretary to Government.

U.R.to P.& S.D.,No,12513/A, dated the 6th June 1953.

MRP.
16/6/56.

Legal Department.

Code of Criminal Procedure, 1898 - Nyaya Panchayats constituted under Bombay Village Panchayats Act, 1933 - whether magistrates -

A Nyaya Panchayat constituted under the Bombay Village Panchayats Act, 1933, is not a magistrate within the meaning of the Code of Criminal Procedure, 1898, and as such sections 12 and 15 of the said Code would not be applicable in its case. Nor would the provisions of section 5 apply to it. As pointed out in R.L.A's opinion No.8099 A, dated 15th April 1953 judicial powers are exercised by a nyaya panchayat by virtue of the special provisions made in the Bombay Village Panchayats Act in that behalf and not by virtue of any of the provisions of the Code of Criminal Procedure. That Act in effect creates a new and an additional judicial body for the trial of certain offences under the different Acts mentioned therein in certain circumstances. These provisions are no doubt repugnant to the provisions of the Code of Criminal Procedure, 1898; but the Provincial Legislature was competent to validly enact the same after obtaining the previous sanction of the Governor-General under rule 2 of the Local Legislatures (Previous Sanction) Rules. Such previous sanction was obtained when the Bombay Village Panchayats Act, 1933, was enacted and when these judicial powers were first given to these bodies. The view taken by the District Magistrate, Kaira, in his letter dated the 22nd May 1953 is not, therefore, correct.

Sd. M.R.Meher
Additional Secretary to Government.

U.R.to H.D.,No.12414/A, dated the 5th June 1953.

MRP.
16/6/56.

Legal Department.

The D.S.Pas. report states that the accused Jevla was not sent to the Medical Officer because he did no express a desire to go to a Medical Officer. The fact that he was not examined by a Medical Officer although he had alleged before the Magistrate that he had been beaten cannot improve the case for a prosecution of the Editor but on the other hand makes it weaker. The opinion expressed by the R.L.A. in No. 10481/A, dated the 5th May 1953, therefore, does not require to be reconsidered.

Sd. M.R.Meher
Additional Secretary to Government.

U.R.to H.D.,No.770/A-Confl.,dated the 15th June 1953.

MRP.
16/6/56.

Office of the R.L.A.

If the proposed withdrawal of the prosecution is at the instance of the administrative department, Instruction No.40(1)(c) of the Instructions regarding the business of the Government would apply, and ~~it~~ in that case the procedure laid down in L.D.Circular No.9882/A of 27th April 1953 will have to be followed.

Sd. J.R.Dhurandhar
28/5
Remembrancer of Legal Affairs.

U.R.to A. & F.D.,No.11955/A, dated the 28th May 1953.

MRP. -
16/6/56.

Legal Department.

Separation of judiciary from executive: effect on other enactments --

Paras 2 and 3 of H.D. note:- The view taken by Home Department that section 2(5) of the Lepers Act, 1898 does not require any amendment is correct. The reference to magistratex in sections 7(b), 8, 9, 10, 11, 12 and 19 of the said Act is to a judicial magistrate and no amendment of the Act would be necessary. The functions to be performed by a magistrate under these sections appear to be essentially judicial and the same cannot, therefore, be performed by an executive magistrate as suggested by the Surgeon General at p.11 ante.

2. Paras 5 and 7 of H.D.note:- The view taken by Home Department is correct.

3. Para 8 of H.D.Note:- No amendment of sections 41, 42 and 43 of the Pharmacy Act, 1948 and sections 47, 48, 49(2), 50 and 51(3) of the Dentists Act, 1948, is necessary as the penalties prescribed therein can only be imposed by a judicial magistrate.

4. Paras 9, 10 and 11 of H.D. note:- The view taken by Home Department is correct.

Sd. M.R.Meher
Additional Secretary to Government.

U.R.to H.D.,No.12665/A, dated the 10th June 1953.

MRP.
16/6/56.

Legal Department.

Code of Criminal Procedure, 1898 - Section 40 -

The questions for the consideration of the R.L.A. are —

(1) whether a resident magistrate who is transferred from one district to another can exercise the powers under the Code of Criminal Procedure with which he was invested in the first district without any fresh notification in that behalf; and

(2) whether a civil judge-cum-Resident magistrate on his transfer to another district can exercise the magisterial powers he was exercising in the district from which he was transferred without any fresh notification in that behalf.

2. If a resident magistrate is transferred as a resident magistrate from one district to another he would continue under section 40 of the Code of Criminal Procedure, 1898, to exercise without any fresh notification in this behalf, the same powers in the local area in which he is transferred as he was exercising in the local area from which he is so transferred (cf. R.L.A's opinion No.39 confl.,dated 20th January 1945). Similarly,if a Civil Judge-cum-Resident Magistrate is transferred to another district as a Civil Judge-cum-Resident Magistrate and not only as a Civil Judge then his transfer can be deemed to be to an equal office of the same nature within the meaning of section 40; and he can exercise the magisterial powers with which he has been invested also in the area to which he has been transferred without any fresh notification. In such a case the decision in Emp.v. Karimbux, A.I.R. 1933 Sind 398 (400) being distinguishable on facts, would not apply.

Sd. M.R.Meher
Additional Secretary to Government.

MRP.
16/6/56.

U.R.to H.D.,No.12949/A,dated the 15th June 1953.

Office of the R.L.A.

Code of Criminal Procedure, 1898, Sec.38A - Honorary Magistrates.

The Home Department note proceeds on the assumption that section 38A of the Criminal Procedure Code imposes a limitation on the State Government's power to appoint any person as a Magistrate. Section 38A has nothing to do with the appointment but comes into play only when judicial powers of the nature specified therein are to be conferred on Magistrates and Judges mentioned in that section. It is in respect of that conferment that consultation with the High Court is necessary. The question of conferment can arise only after a person is appointed a Magistrate or Judge as the case may be. Whether consultation with the High Court is necessary in respect of the appointment will depend upon the terms of the section relating to appointment and the terms of the notification under Article 237 of the Constitution.

Sections 36 and 38A of the Criminal Procedure Code deal with different sets of powers. Section 36 deals with the powers conferred upon the respective Magistrates by the Code itself. Those are called their ordinary powers. Thus for example, a power to arrest or order the arrest of an offender who has committed an offence in the presence of a Magistrate within the limits of his jurisdiction is one conferred by section 64 of the Code itself and does not require to be conferred independently by an order of the State Government. Section 38A applies when any

judicial

any judicial powers "are to be conferred" and contemplates "orders conferring such powers or empowering the exercise of such powers". Such orders are to be made by the State Government under any provisions of the Code or of any law for the time being in of force relating to any of the matters specified in Lists II and III of the 7th Schedule to the Constitution. It would appear that no consultation with the High Court is necessary in respect of powers which by section 36 are called the ordinary powers of the Magistrates. Consultation would be necessary only in respect of powers which are conferred by orders of the State Government under section 38A.

Similarly under the Code the Presidency Magistrate is entitled to exercise certain powers. These powers are conferred by the Code itself. For example, under section 206 any Presidency Magistrate may commit any person for trial to the Court of Sessions or the High Court for an offence triable by such court. To use the language of section 36, these would be the ordinary powers of the Presidency Magistrates and for the conferment and exercise of those powers no consultation with the High Court would be necessary.

The Honorary Presidency Magistrates and the Honorary Magistrates of the 2nd Class, as appears from the Home Department note, are not required to exercise and do not in fact exercise any judicial powers. If that is so, the reasons given in R.L.A's Opinion No.9091/A dated 16th April 1953, do not apply to their case and their reappointment may not be necessary.

The/

The Juvenile Court is constituted under section 7 of the Bombay Children Act, 1948. The powers conferred on that Court are conferred by the provisions of the said Act and not under any provisions of the Criminal Procedure Code. The Court itself is not such Judge or Magistrate as is mentioned in section 38A though it may be composed of members who may be Magistrates. That being so, section 38A of the Criminal Procedure Code would not be attracted in respect of powers conferred on and exercisable by such court.

Sd. J.R.Dhurandhar
19/6
Remembrancer of Legal Affairs.

U.R.to H.D.,No.13271/A, dated the 19th June 1953.

MRP.
16/6/56.

L.D.
14370, dated 12-6-53

x x x x

The Secretary, Home Department, observes that the intention of leaving section 62 unamended is that the District Magistrate, who is an executive magistrate and the head of the police force in his district, should be able to exercise the check after the separation. The R.L.A. is requested to advise whether the powers under section 62 will have to be exercised by the Judicial Authorities e.g. Session Judge or whether the District Magistrate can exercise the check after the separation.

x x x x x x

Id. M.V.T.
13/6/53

D.S.(Cr.) Sd.Akbar S.Sarela
17/6.

Addl. Secy.

Id. M.R.M.
17/6

MRP.
16/6/56.

Legal Department.

Separation of Judiciary from Executive -- Amendment of section 62 of Cr. P.C.

Section 62 of the Code of Criminal Procedure, 1898, appears to have been intentionally left unamended by the Separation Act (Cf. sec.18 of the Bombay Police Act, 1951). The view taken by Secretary, Home Department, is correct.

Sd. M.R.Meher

Additional Secretary to Government.

U.R.to H.D.,No.13269/A, dated the 19th June 1953.

MRP.
16/6/56.

Legal Department.

Separation of Judiciary from Executive - Amendments to Bombay Village Panchayats Act, 1933 and Bombay Local Boards Act.

Para 7 of H.D.note: The view taken by H.D. that no further amendment is necessary in the Bombay Village Panchayats Act,1933, is correct.

2. Para.9 of H.D.note: As pointed out in R.L.A's opinion No.9390A, dated the 21st April 1953, it is not the intention of Government that after separation offences under special laws should be tried by magistrates other than judicial magistrates. The prosecution under the said Act or the by-laws made thereunder will have,therefore, to be instituted before a judicial magistrate alone, and as such no amendment of section 70(2) of the Bombay Local Boards Act, 1923, would be necessary.

3. Paras 10 and 11 of H.D. note: Reference to a "magistrate" in section 115 of the Local Boards Act is to a magistrate referred to in section 70(2), who, after separation, would be a judicial magistrate. The view taken by H.D. that section 115 would not require any amendment is, therefore, correct.

5. Para 14 of H.D. note: The functions of a Magistrate under section 115A(2) of the Local Boards Act are not of a judicial nature and can,therefore, be performed by both the judicial and executive magistrates. Unless it is intended that the same should be performed by executive magistrates alone the section would not require any amendment.

Sd. M.R.Meher
Additional Secretary to Government.

U.R.to H.D.,No.13270/A, dated the 19th June 1953.

MRP.
18/6/56.

L.D.

14643, dated 16-6-53.

x x x x x x

Submitted.

The C.P.M., Bombay, is of ~~m~~ the view that it is not necessary to withdraw the powers of the Presidency Magistrates and to re-appoint ~~t~~hem by name as the Separation Act does not make any vital change so far as these Magistrates are concerned. The High Court agrees with the C.P.M. The R.L.A. is requested to advise whether in view of this position it would be necessary to re-appoint the Presidency Magistrates.

x x x x x

Id. M.V.T.
17/6/53
D.S.(Cr.

Id. A.S.S.
19.6.53

Addl. Secy.

x x x

Id. M.R.M.
19/6/53

R.L.A.

MRP.

Office of the R.L.A.

Separation of judiciary from executive - re. appointment of Presidency Magistrates -

There is no objection to follow the course suggested by the Chief Presidency Magistrate and approved by the High Court. It is not necessary to withdraw the powers of the Presidency Magistrates and to reappointthem again.

Sd. J. R. Dhurandhar
20/6
Remembrancer of Legal Affairs.

U.R.to H.D.,No.13339/A, dated the 20th June 1953.

MRP.

Office of the R.L.A.

Indian Navy (discipline) Act, 1934. (XXXIX) of 1934),- Section 72 provides for a declaration before a magistrate This declaration may be Before a judicial magistrate or executive magistrate. No amendment is necessary. The view taken by the H.D. is correct.

It appears that the function of the District Magistrate under section 76 is not purely of a judicial nature as presumed by Home Department and there is no objection to allowing the provision to stand.

The Territorial Army Act,1948, (LVI of 1948).- The view taken by the Home Department regarding the provisions of section 11 is correct.

Section 136(2)(3) of the Air Force Act, 1950.-

Section 137(2)(3) of the Army Act, 1950.- The section provides for examination of witnesses on commission. According to the provision a commission is to be issued to any district magistrate or a magistrate of the first class. It is true that sub-section (2) refers to the appointment of a magistrate of the first class by the District Magistrate for the purpose of examining the witness; but in the State of Bombay, after separation, the district magistrate would himself examine the witness as it would not be competent to him to appoint a magistrate of the first class for the purpose. Provisions of the section as they stand can be worked out even when the Scheme of the separation comes into force in the State of Bombay. No amendment is, therefore,necessary.

The view taken by the Home Department with regard to other sections of the said two Acts is correct and no amendment is necessary.

Sd. J.R.Dhurandhar
16/6
Remembrancer of Legal Affairs.

U.R.to H.D.No.13103/B, dated the 17th June 1953.

MRP. 18/6/56.

Legal Department.

Separation of judiciary from executive - effect on Official Secrets Act and Registration of Foreigners Rules.

Under sub-section (1), read with sub-section (5), of section 13 of the Official Secrets Act, 1923, the State Government would be competent to specially empower a magistrate of the first class to try cases in relation to any offences under section 5 not connected with a prohibited place or with a foreign power and the Central Government will have to empower any such magistrate to try cases in relation to any other offences under the Act. The Central Government will haven, therefore, to be moved to issue a notification under section 13 only if the First Class Magistrates are to be empowered to try cases referred to in clause (b) of sub-section (5) of that section. If no notification has so far been issued under section 13 either by this Government or the Central Government the question of issuing fresh notification in this behalf, after the separation of judiciary and executive comes into force, would not arise. The question whether any magistrate of the first class should not be empowered under that section is for the administrative Department to decide.

2. The view taken in para 5 of the Home Department note at pages 33-34 N/s that the functions of a magistrate under rules 5,8,9 and 14 of the Registration of Foreigners Rules,1939, are executive functions and that the penalty prescribed in section 5 of the Registration of

Foreigners --

of Foreigners Act, 1939, for contravention of any of the rules can be imposed only by a judicial magistrate is correct. As the said rules stand at present the functions specified therein can, however, be performed both by judicial and executive magistrates and unless it is intended that they should be performed only by executive magistrates these rules would not require any amendment.

Sd. M.R.Meher
Additional Secretary to Government.

U.R.to P.& S.D.,No.13564/A, dated the 24th June 1953.

MRP.
18/6/56.

Legal Department.

Separation of Judiciary from executive - Cr. P.C. - Sec.-10 & 13(1) - Sub-D visional and Taluka Magistrates.

Even though an additional District Magistrate appointed under section 10 of the Code of Criminal Procedure, 1898, would have all the ordinary powers of a Sub-Divisional Magistrate, he cannot, it appears, be placed in charge of a specific sub-division unless he is appointed also as a sub-duvisional magistrate for that sub-division under section 13(1).

2. In his opinion No.5036/A, dated the 16th March 1953, the Remembrancer of Legal Affairs has pointed out that in the matter of appointments of various classes of magistrates under the Code of Criminal Procedure, 1898, the difference of phraseology used therefor suggests that where the plural was intended a plural has been used and where the singular was intended a singular has been used. In view of this it appears that the expression "any taluka Magistrate", in clause (ii) of sub-section (2) of section 13 would not convey the meaning of "more than one Taluka Magistrtrate". Consequently it would not be possible to place more than one Taluka Magistrate in charge of a taluka or mahal unless that section is suitably amended.

Sd. M.R.Meher

Additional Secretary to Government.

U.R.to H.D.,No.13338/A, dated the 20th June 1953.

MRP.
18/6/56.

Office of the R.L.A.

Section 164 lays down that a Magistrate may record statement or confession. But in this, as in other similar enactments the discretion cannot be exercised arbitarily, and it does not follow that a Magistrate has a complete and unfettered discretion to record or not to record any statement as he chooses.

In the present case the Police first approached the Magistrate by an application in which no reasons were given for getting the statements of witnesses recorded. In the subsequent application they gove the reasons that the witnesses were the nearest relatives of the accused and it was suspected that they would be tampered with by the interested parties. The reasons would appear to be, prima facie, sufficient for recording the statements under section 164. The Magistrat has however observed that the reasons mentioned for recording the statements were not sufficient for him to reporд at that stage. It is not clear what the learned Magistrate meant by "at this stage" as such statement can only be recorded in the course of an investigation or before the commencement of the inquiry or trial. The order, however, was passed by the Magistrate on 10-4-1953, and it would serve no useful purpose to go in revision to the High Court as by the time a decision is reached, the investigation if not already over would be over and the committal enquiry in the murder case

would --

would have commenced. The District Magistrate has stated that this is the first case of its type, and the R.L.A. is requested to give his considered opinion as to what further action may be taken.

Ordinarily, when a police officer in the course of an investigation gives good reasons for getting a statement of a witness recorded under section 164 Cr. P.C. it would not be a proper exercise of discretion on the part of a Magistrate not to record a statement under section 164, unless he considers that the witness is not making a voluntary statement. In such a case (and such cases must be rare and the D.M. has pointed out that this is the first case of its kind), if a Magistrate refuses to record a statement of a witness, it sould be feasible for the Police to take the witness to another Magistrate, preferably a Magistrate of a higher grade, such as a Sub-Divisional Magistrate, and this course seems unobjectionable particularly in view of the practical difficulties of filing a revision application in the High Court and getting a decision before the investigation is complete or before the committal inquiry or trial, as the case may be, commence.

Sd. J.R:Dhurandhar

Remembrancer of Legal Affairs.

U.R.to H.D.,No.13596/A, dated the 25th June 1953.

MRP.
18/6/56.